DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-220455 DATE: March 31, 1986

MATTER OF: Standard Manufacturing Company

DIGEST:

1. Where, before award, but after the receipt of best and final offers, an offeror claims a mistake in its proposal, regulatory provisions governing the correction of a mistake in a negotiated procurement are not directly applicable although agency can--but is not required to--reopen negotiations with offerors to allow the offeror claiming the mistake to revise its proposal, if the agency determines that it is clearly in the government's best interests to do so.

2. Where agency during discussions specifically advised the protester to review its proposed pricing and thereafter disclosed the relative prices of the remaining offerors in requesting the protester to verify its price, agency determination not to reopen negotiations to allow protester to correct a subsequently discovered error will not be questioned since, notwithstanding protester's assertion that agency erred in disclosing relative prices, protester was previously provided an opportunity to review its proposal and further negotiations would result in the use of prohibited auction techniques.

3. Although an agency may utilize a bidder's worksheets or any other data in a sealed bidding acquisition and permit the upward correction of a bid based on this evidence where the bid is low with or without the correction, protest that correction should be allowed in similar circumstances in a negotiated procurement is without merit since, under the Federal Acquisition Regulation, correction of a mistake which requires resort to evidence outside the RFP

is appropriate only if the agency reopens discussions with all competitive range offerors.

Standard Manufacturing Company (Standard) protests the award of a contract to any other offeror under request for proposals (RFP) No. N00140-85-R-2652 issued by the Department of the Navy for the acquisition of 160 hangar deck cranes. After the submission of best and final offers (BAFOs), but prior to award, Standard, the low technically acceptable offeror, discovered that it had made a mistake in its proposed price for a source control winch. Standard contends that its intended price for this item can be clearly established from the record, that correction would not change the relative ranking of the offerors and that, under the circumstances, the Navy has improperly refused to request another round of BAFOs to allow Standard to correct the mistake.

We deny the protest.

The RFP was issued on March 22, 1985. Award was to be made to the single responsive offeror whose total offer was most advantageous to the government; the Navy received 25 responses by the June 13 closing date. A review of the proposals received showed that no offeror had taken any exception to the RFP's specifications or delivery requirements, and that many proposals were priced significantly below the government's estimate of $6,264,000. The offers ranged from 7 percent to 67 percent below the estimate and 12 offerors were more than 50 percent below the proposed price of the previous contractor. A more detailed analysis of each offeror's proposed labor hours and material costs also showed that most offerors had proposed far fewer labor hours and far less in material costs than the government's estimate.

However, since the 10 lowest-priced offerors were all well known producers with a record of knowledgeable pricing, the Navy decided that its own estimate was inaccurate. A competitive range was established comprised of the nine lowest priced offerors and the previous contractor. Thereafter, oral discussions were held and Standard and all offerors were requested to review specific price areas identified by the Navy as requiring special care. By letter dated August 16, Standard was requested to submit a BAFO and was again advised to review its proposed pricing. BAFOs were received on September 13 and Standard reduced

its already low offer slightly, while all but one of the remaining offerors, either raised their prices or withdrew from the competition.

Based on the BAFOs submitted, and the price difference between Standard's offer and the next low offer, the contracting officer suspected that Standard had made a mistake. On October 4, the contracting officer sent Standard a wire advising Standard that its ". . . per unit price was 53 percent lower than the $29,302 per unit price paid under [the] prior contract . . .," that its price of ". . . $1,981,373 is 25 percent lower than that of the next low offeror . . .," and that the other ". . . best and final offers ranged from $2,650,000 to $5,810,000." The contracting officer requested Standard to review its pricing and verify its price. By wire dated October 8, Standard responded and advised the Navy that it could find no mistake in its proposal and that its offer remained as stated.

Prior to the completion of a preaward survey of Standard, Standard advised the Navy that it had just discovered a mistake in the pricing of the source control winch, an important component of the hangar deck crane. Standard advised the Navy that on April 10, 1985, it had obtained a telephone quotation for the winch in the amount of $1,495 and relied on the oral quotation in pricing its proposal. A written quotation, sent by the manufacturer on April 23 in the amount of $4,440, was not brought to the attention of Standard's estimating or production departments since there was nothing on the face of the quotation which indicated that the oral quotation was erroneous. The mistake was discovered when Standard called the manufacturer to verify the delivery schedule for the winch. The overall amount of the mistake was approximately $500,000 and if corrected, Standard's low offer would still remain low by well over $100,000.

The Navy completed its preaward survey and found that all other elements of Standard's proposal were satisfactory. Concerning the alleged mistake, the Navy determined that correction of the error would require the reopening of discussions with all offerors in the competitive range since the error was material and reference to documents outside Standard's proposal would be necessary to establish the existence of the mistake and the intended offer. The Navy concluded that meaningful discussions already had been held with Standard that should have enabled Standard to detect its error. In addition, since

the Navy had revealed the price of Standard's nearest competitor and the range of other offers in providing Standard notice of the suspected mistake, the Navy decided it would not be fair to the other offerors or in the government's best interests to request the submission of a second round of BAFOs. The Navy requested Standard to either confirm its price or withdraw its proposal.

Standard contends that the Navy failed to conduct meaningful discussions with the firm since the contracting officer failed to adequately advise Standard during discussions of a suspected mistake in Standard's offer. Standard argues that suspected mistakes are to be resolved through discussions and the Navy's failure to raise this matter was clearly prejudicial.

In addition, Standard contends that under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.607 (1984), additional discussions are the appropriate vehicle to resolve a suspected mistake of this nature and that under this provision, the contracting officer had no choice but to reopen negotiations and request a second round of BAFOs. Standard contends that there is nothing in the FAR which indicates that mistakes cannot be corrected after BAFOs have been received and that, in view of the emphasis placed on resolving suspected mistakes through discussions, additional discussions should be held.

Also, Standard complains that the Navy's rationale for refusing to reopen discussions is not proper. Standard contends that the Navy should not have revealed to Standard the prices of its nearest competitor when asking the firm to verify its price. Standard asserts that it should not be penalized for the Navy's actions in this regard, and also argues that it is in the government's best interest to reopen negotiations since its price would still be substantially lower than its nearest competitor. Standard argues that the amount of the mistake is clearly established by the written quotation the firm subsequently received and, in similar circumstances, we have allowed the upward correction of an offeror's proposed price since the offer is low with or without the correction. Standard contends that it would be unfair to disallow the correction of the mistake simply because BAFOs have been received, and that the Navy should be required to reopen negotiations in this case. Standard argues that public policy favors the correction of mistakes, and that the Navy should be required to reopen negotiations in this case.

We find Standard's contention that the Navy failed to conduct meaningful discussions with the firm clearly without merit. We find no basis to fault the agency's failure to discover and discuss with Standard an error that Standard was unable to find even after the firm was specifically requested to review its pricing in the particular area of the subsequently alleged mistake. When an agency decides to conduct discussions, its burden is to furnish those offerors within the competitive range information concerning the areas of perceived deficiencies in their proposals and give those offerors the opportunity to revise those proposals. Barber-Nichols Engineering Co., B-216846, Mar. 25, 1985, 85-1 CPD ¶ 343. The mistake in Standard's proposal was not one that should have been reasonably detected by the Navy, and Standard does not argue otherwise. Cf. American Management Systems, Inc., B-215283, Aug. 20, 1984, 84-2 CPD ¶ 199. Therefore, the Navy cannot be said to have failed to hold meaningful discussions, since it could not discuss an error of which it was unaware.

With respect to the procedures to be followed when a mistake is suspected or alleged before award in a negotiated procurement, section 15.607 of the FAR contemplates that, in general, the mistake will be resolved through clarifications or discussions. See also FAR, 48 C.F.R. § 15.610(c)(4) (which requires agencies to resolve suspected mistakes through discussions). We have recognized, however, that the regulation does not specifically cover the situation, where, as here, the mistake is not claimed until after the agency has completed discussions. See American Electronic Laboratories, Inc., B-219582, Nov. 13, 1985, 65 Comp. Gen. ____, 85-2 CPD ¶ 545; Timeplex, Inc., B-220069, Dec. 12, 1985, 85-2 CPD ¶ 651. Although Standard argues that the FAR does cover this situation, we note that under section 15.610(c)(4) of the FAR, agencies are obligated to resolve only "suspected mistakes." In our view, the contracting agency's responsibility under this provision is to call to each offeror's attention during discussion errors which should be reasonably detected by the agency. Cf. American Management Systems, Inc., supra. When the mistake is not discovered until after discussions have been completed and there is no evidence that the agency was on actual or constructive notice of the claimed mistake, neither section 15.607 nor section 15.610(c)(4) requires the agency to reopen negotiations.

Furthermore, our prior decisions have never required agencies to reopen negotiations where a mistake is claimed after the receipt of BAFOs. We think the current situation is analogous to the case where an offeror first introduces an ambiguity in its BAFO since in both cases there is nothing in the offeror's initial proposal which should have alerted the agency to the subsequent problem. It is only because of subsequent action--the submission of a BAFO which deviates from the initial offer, or the offeror's discovery of a mistake after submitting its BAFO--that first raises a question as to what the offeror intended to provide or at what price the offeror intended to perform. Although our decisions have upheld an agency determination to reopen negotiations in such a case, agencies may, but are not required to, provide the offeror with an opportunity to discuss the matter. Electronic Communications, Inc., 55 Comp. Gen. 636 (1976), 76-1 CPD ¶ 15; Varian Assocs., Inc., B-209658, June 15, 1983, 83-1 CPD ¶ 658. Consequently, the sole remaining question is whether the Navy abused its discretion in refusing to reopen negotiations and request a second round of BAFOs.

Under section 15.611(c) of the FAR, after the receipt of BAFOs, the contracting officer should not reopen discussions unless it is clearly in the government's interest to do so. See also Alchemy, Inc., B-207338, June 8, 1983, 83-1 CPD ¶ 621. Since the Navy released pricing information concerning the other offeror's proposals in requesting Standard to verify its BAFO, further negotiations would have resulted in the use of prohibited auction techniques and not been in the government's best interest. American Electric Laboratories, Inc., supra. Given in addition that meaningful discussions had been held, the refusal to reopen discussions was consistent with the FAR and a reasonable exercise of the Navy's discretion.

Furthermore, Standard's assertion that it should not be prejudiced by the Navy's improper disclosure of other offeror's pricing information ignores the fact that its own error is the cause of the problem. Although agencies should be encouraged to allow the correction of errors, offerors also have a responsibility to exercise due care and diligence in preparing their proposals. The Navy, prior to the submission of BAFOs, requested Standard on two separate occasions to thoroughly review its proposal for possible errors, and we see no reason to require the Navy to afford Standard a third opportunity. Therefore, we will not object to the Navy's refusal to reopen discussions.

Finally, we note Standard's argument that our decisions have permitted the upward correction of a proposed price where clear and convincing evidence establishes both the existence and the amount of the mistake and where the price would nonetheless remain low. These cases, however, arise in the context of sealed bidding acquisitions, and section 14.406-3(a) of the FAR authorizes the agency to utilize a bidder's worksheets or any other data where the bidder is low with or without correction. See also S.W. Electronics and Mfg. Corp., B-218842, Aug. 2, 1985, 85-2 CPD ¶ 157. On the other hand, in a negotiated procurement, the thrust of the regulations is that correction of a mistake, without conducting discussions with all offerors, is appropriate only where the existence of the mistake and the proposal actually intended can be clearly and convincingly established from the RFP and the proposal itself. FAR, 48 C.F.R. § 15.607(c)(3). When resort to evidence outside the RFP is required to establish the mistake or intended price, the mistake is to be corrected only through discussions. FAR, 48 C.F.R. § 15.607(c)(5). We find no basis in the regulations to permit the correction of the mistake alleged here without reopening discussions, and as previously indicated, we do not find that the Navy abused its discretion in refusing to do so.

The protest is denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel